



**Republic v Shiboka (Criminal Case 35 of 2013)
[2025] KEHC 1829 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 35 OF 2013
SC CHIRCHIR, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

PATRICK OPONGA SHIBOKA ACCUSED

JUDGMENT

1. Partick Oponga Shiboka (the accused), was charged with the murder of Japheth Indimuli (Deceased) contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the charge are that on 9th July, 2013, at Kenya Industrial Estates, in Kakamega Municipality, within Kakamega County, murdered Japheth Indimuli

Prosecution's Case

3. The first witness was one Daniel Nyabuto Bosire. He told the court that the deceased was his employee, working with him in a workshop. He also knew the accused who used to operate a timber workshop in the same area. The two workshops were next to each other.
4. On 9/7/2013 while working in the workshop, he saw two people chasing each other and one being chased headed towards his workshop. The chaser was the accused. He did not recognize the one being chased. The person being chased entered his workshop and he saw the accused throw a piece of wood on him. PW1 asked the accused what the matter was but he did not respond. Instead he went back and got another piece of wood. He came and stood on PW1's workshop's entrance and threw the timber on the same person. The wood missed the intended person and hit the deceased instead. The deceased was hit on the head and he fell down. The piece of wood was 2- meters long, but thick, he stated. The deceased was inside PW1's workshop doing some work using a machine.



5. The deceased bled on his head and PW1 took his T-shirt and tied on the deceased's head in an attempt to stop the bleeding. The injury was on the left temple. The bleeding was profuse. PW1 raised an alarm and neighbours came and assisted on administering first aid on the deceased.
6. The accused got a taxi and took the deceased to hospital while PW1 went to the police station and made a report of the incident. At about 7p.m he got a report that the deceased had died.
7. At cross-examination, he told the court that before the incident, it was only him and the deceased who were inside his workshop. He had known the accused for 2 years.
8. He further testified that there was no bad blood between him and the accused and he was also aware that the accused and the deceased related well. He further stated that when the other person entered his workshop, he told the accused to leave him alone but the accused did not respond. The accused was still angry and still wanted to beat up the other person.
9. He further stated that it was the 2nd piece of wood that hit the deceased; that other neighbours including Nabweke Jason and Nickson Emoko responded when the incident happened. He stated that the person being chased was not carrying any weapon. He admitted that the accused's target was not the deceased.
10. On re-examination, he stated that the door to the workshop is wide; that he could see anything happening outside. The accused did not attack anyone else.
11. PW2 was the pathologist. He told the court that Alfred Indimuli identified the body of the deceased. On examination he found that there was a wound on the left side of the skull which had been stitched, there was no defence injuries. Internally there was bleeding under the brain, covering both on the left and right side. There was no skull fracture; He formed the opinion that the cause of death was closed head injury secondary to blunt force trauma on the head. He produced the Post-Mortem report (Pexb .1).
12. On cross-examination he admitted that there was the names of the deceased was mixed up but we relied heavily on the identification by Alfred Indimuli. The name of the deceased as shown on the 1st page of the report was different from that indicated on the 2nd page.
13. The prosecution closed its case.

Defence's Case

14. At the close of the prosecution case the accused was put on his DW1 was the accused. He told the court that on that day, he had an altercation with a person by the name Anyole who had failed to refund some Kshs. 200, and had been discourteous to his visitor. He followed him to PW1 shop still inquiring about the money. He said the deceased, who had been bending while working on a machine, got up to inquire about what was going on. He was hit by a piece of wood which was on the shelf.
15. They got a motorbike and he took him to hospital. He paid the bills and stayed with him. At about 4. Pm the doctor told him that the deceased needed to be referred to a better hospital. He went to look for money for the Ambulance but when he came back, he found that the deceased had died. He was arrested at the hospital by the police.
16. He denied hitting the deceased with a wood, and insisted that the deceased hit himself. He further testified that he had no differences with the deceased or PW1.
17. On cross-examination he stated that PW1 lied to the court on what transpired. He stated that he had a good relationship with him but he could not tell why he would frame him. He stated that he withdrew



Kshs 20,000/= for further treatment; that PW1 did not make any contribution to the treatment , though he was the deceased's Employer.

18. He admitted that the deceased got hit at PW1's workshop and that it was only PW1 and the deceased in the workshop; he admitted that he followed Anyole to PW1's workshop; that his quarrel was with Anyole and not the deceased. He admitted that he was angry with Anyole for using Kshs. 200 he had given him and for disrespecting his visitor. He stated that the deceased was hit on the right side of the head. He disagreed with the pathologist's findings on the injury site.
19. On cross- examination by the court, he stated that Anyole was a neighbor and used to help him do some work in the workshop ; that he had followed him to PW1's workshop to only make peace. He stated that the shelf which hit the deceased was full of wet- timber, hence it was heavy. On being asked why he opted to pay the deceased bills , he stated that he did as a fellow colleague.
20. On further cross-examination by the prosecutor, he stated that he went to look for more money when the doctor stated that the deceased needed to be taken to a better hospital.

Submissions

21. None of the parties filed submissions.

Analysis and Determination

22. Section 203 of the *Penal Code* defines murder as follows; "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".
23. From the above definition, the basic elements of the offence of murder which the prosecution must prove is the fact of death of the deceased; what caused the death; that the death was caused by the person who has been accused of; and finally that that the killing was preceded by malice

The Death of the Deceased

24. DW2 ,the pathologist, told the court that he examined the body of the deceased. The body was identified by one Alfred Indimuli. He produced the Post Mortem report (Pexb.1). The defence taken issue with the identity of the deceased as there was discrepancy on the names as it was indicated on page 1 and 2 of the report. While admitting the discrepancy, which he attributed to inadvertence, the doctor stated that he placed his reliance on the fact of identification by Alfred Indimuli.
25. On page 1 of the report, the deceased's name is stated as Japheth Indimuli and the person to identify was Alfred Indimuli. The pathologist told the court that this first page was filed by the police officer. Page 2 was filled by the doctor himself and indicated that deceased as Alfred Ainea Indimuli . Both PW1 and the accused testified to the fact that the victim of the attack was one Japhet Indimuli. It is the same person who , according to the accused , he took to the hospital was treated but later died. and later died. taken to hospital and who later died .
26. I am satisfied that, based on the evidence of PW1, the pathologist and the accused, the death of Japhet Indimulu was duly proved.
27. On what caused the death, the doctor opined that the cause was a closed head injury due to blunt force trauma. The cause of death was proved too.



Whether the accused is the one who caused the death

28. PW1 gave a detailed account of what transpired and it was on account that remained firm in cross – examination. He was inside the workshop with the deceased when the incident occurred; he knew both the accused and the deceased. The accused was the owner of the next shop, while the deceased was his employer. He testified that he saw the accused chasing another person, who was later identified by the accused as Anyole. According to PW1 the accused threw a piece of wood which missed Anyole. He then went to get a 2nd piece , which he threw . The wood missed Anyole and instead hit the deceased. The accused refute this and states that the deceased hit himself on a shelf that was full of wet timber .
29. I have considered the two opposing versions on what transpired and I find the testimony of PW1 plausible. PW1’s testimony remained firm on cross-examination as aforesaid. Further , PW1 testified that the wood was aimed at Anyole, not the deceased. This was confirmed by the accused when he subtly admitted on cross-examination that his quarrel was with Anyole not the deceased. Further, again, in an attempt to explain how the deceased was hit the accused stated that he was hit on the right side of the head. This however differs with the findings of the pathologist who told the court that the injury was on the left side of the skull.
30. Although on further cross-examination by the court, he stated that he only went to PW1’s workshop to make peace with Anyole this is negated by his admission at cross -examination by the prosecution, that he was angry with Anyole . It emerged that Anyole’s sin was failing to buy nails and converting the ksh. 200 given to him for his own use, and for being discourteous to the accused’s visitor. His admission of being angry corroborated PW1’s evidence that the accused was angry, so angry that he could not respond when PW1 told him to leave the young man alone, after he threw the first piece of wood.
31. Contrary to what the accused’s stated in his defence therefore, his trip to PW1’s workshop was far from being a peace mission He went to attack Anyole but ended up attacking the deceased.
32. His subsequent conduct too, was quite telling. The deceased was PW1’s worker not the accused’s . if the injury was an accidental one , which happened in no less a place than the employer’s workshop, in the course of duty, then logically , it ought to have been PW1 making all the necessary effort to get treatment for the deceased.
33. What we see instead was the accused , taking the deceased to hospital paying for treatment , staying with him in the hospital and getting more funds when the need for better medical attention became necessary. Indeed he told the court that PW1 did not contribute for treatment.
34. I refuse to accept the accused’s assertion that he was being charitable to a fellow worker. If the injury was accidental all the above should have been done by PW1 as the employer. The accused was simply trying to “ atone” for his sins.
35. I am satisfied that the prosecution has proved that it is the accused who caused the fatal injury to the deceased.

“Malice Aforethought

36. The court of Appeal , in the case of *Nzuki v Republic* [1993] KECA 83 (KLR) described malice aforethought as follows: Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:



- (i) The intention to cause death;
- (ii) The intention to cause grievous bodily harm;
- (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.”

36. The testimony of PW1 was that, he first saw the accused chasing Anyole, and they later entered his workshop. The accused threw a piece of wood at Anyole but it missed him. PW1 then told the accused to leave him (Anyole) alone. The accused did not respond as according to the witness the accused was angry. He then went for another wood. The wood was 2 metres but thick. This 2nd wood was thrown again and it hit the deceased.
37. It is evident that Anyole had annoyed the accused, and the accused was determined to set and hurt him. The fact that he made a second trip to get another weapon showed his determination. The accused must have known or ought to have known that a piece of wood thrown at someone’s head one of the sensitive parts of the human body was likely to cause a death or at least a grievous harm.
38. I am satisfied the accused and met the actions of the accused met the threshold of malice as set out under section 206 (b) of the penal code and as held by the court of Appeal on the above cited decision.
39. What happened in the instant case is what is called transferred malice. Expounding on what constitutes transferred malice, the Court of Appeal in the case of Peter Kiambi Muriuki Vs Republic (2013) KECA 452 KLR, explained it as follows; ”Where a person intends to commit a particular crime and brings about the elements which constitute that crime he may be convicted notwithstanding that the crime takes effect in a manner which was an unintended or unforeseen: The intent and the act must concede under the doctrine of transferred malice, whether a defendant fires a gun intending to kill X, but missed and instead kills Y, he will not escape liability for the murder of Y simply because it was his intention to kill X. The defendant has committed the actus reus that he intended, namely cause the death of a human being; it is then said malice against X can be transferred to Y”
40. The scenario painted by the Court of Appeal in Peter Kiambi’s case(supra) is what exactly happened in the present case. The malice intended for Anyole was transferred to the deceased.
41. I am satisfied that malice aforethought was proved.
42. In conclusion I am satisfied that the prosecution has proved, beyond reasonable doubt, the offence of murder against the accused under section 203 as read with section 204 of the penal code, and I hereby convict him as charged.

DATED, SIGNED AND DELIVERED AT ISIOLO, VIA MICROSOFT TEAMS, THIS 20TH DAY OF FEBRUARY, 2025.

S. CHIRCHIR

JUDGE

In the presence of:



Godwin Luyundi- Court Assistant

The Accused- in person

Ms. Kagai for D.P.P

